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EDWARD E. TETOR,

Petitioner,

vs.

LEE C. WALLICK,

Respondent.

[redacted]

ANSWER [redacted] OF LEE C. WALLICK, RESPONDENT.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 188.

EDWARD H. TITUS,

Petitioner,

vs.

LOU C. WALLICK,

Respondent.

ANSWER BRIEF OF LOU C. WALLICK, RESPONDENT.

STATEMENT OF CASE.

We cannot agree with a number of the conclusions drawn by petitioner. Hence, we feel impelled to set forth a brief history of this litigation and the issues and facts involved as we understand them. Bold-faced type is ours excepting where otherwise noted.

The Pleadings and the Trial in the Court Below.

The issues are joined on the petition, amended answer, amendment to amended answer and the reply to the amended answer.

The petition (R., 7) sets forth a judgment of three hundred eighty-nine thousand one hundred three dollars and twenty-one cents ($389,103.21) alleged to have been recovered in the Supreme Court of New York county, state of New York. An exemplified copy of the judgment is annexed to the petition. (R., 19.)

The amended answer of the defendant sets up defenses as follows (R., 40):

1. The judgment in the New York proceedings is not responsive to the issues tendered by the pleadings.

2. The plaintiff in the action at bar, in Franklin county, Ohio, is not the real party in interest.

3. The judgment in the New York proceeding was procured through fraud practiced upon the New York court and upon the defendant, in that the plaintiff was at no time, from the very institution of the suit, the real party in interest and surreptitiously suppressed that fact.

4. A general denial.

The amendment to the amended (R., 41) answer pleads the New York real party in interest statute, which was in force at the time of the institution of the proceeding in New York and has continued in force since that time.

The reply (R., 43) admits the allegations of the amendment to the amended answer and alleges that all matters

set up in the amended answer were adjudicated in the New York proceeding.

The cause came on for trial in the Court of Common Pleas, Franklin county, Ohio (Columbus), before Honorable Charles A. Leach, January 20, 1936. A jury was waived with consent of the court. The evidence offered at the trial consisted entirely of documentary evidence. At the trial the plaintiff asked permission to take depositions in New York to prove delivery of Plaintiff's Exhibit D, and permission to take such deposition was granted. (R., 60, 61.)

The opinion of Judge Leach of the trial court (R., 148) was announced April 21, 1936. Thereafter, the plaintiff filed a motion requesting the court to state in writing the conclusions of fact found separately from the conclusions of law. (R., 158.) The court complying with that request, found that the issues raised by the first defense (that the judgment in New York was not responsive to the issues) could not be relitigated; **that the plaintiff was not the real party in interest in the action at bar and had no right to maintain this action in Ohio in his name**; and that the plaintiff practiced a fraud upon the New York courts and upon the defendant (the respondent at bar) in the procurement of the judgment and therefore the judgment is impeachable in this action. (R., 160.)

History of the New York Case.

The New York case was instituted December 22, 1925, by the filing of a complaint and the issuing of summons.

The plaintiff primarily was claiming the ownership of two hundred and fifty shares (250) shares of the common stock of The Secor Hotel Company, of Toledo, Ohio, an Ohio corporation, which two hundred and fifty (250) shares represented a one-fourth (¼) interest in the company and which two hundred and fifty (250) shares plaintiff claimed he owned by virtue of an oral promise (R., 108) made in 1906, nineteen (19) years before the suit was brought. The plaintiff in addition to his claim for the recovery of said shares asked for relief in the way of an accounting against the defendant for dividends or other sums received by the defendant to which the plaintiff claimed to be entitled by reason of his ownership of said shares.

The first trial before Justice Proskauer resulted in a dismissal of the plaintiff's complaint. (R., 108.)

The plaintiff then appealed to the Appellate Division. The Appellate Division on the printed record proceeded to reverse the trial court who had seen and heard the witnesses and the Appellate Division did not order a new trial but rendered judgment for the plaintiff for the recovery of the two hundred and fifty (250) shares of stock and directed an accounting of sums received as dividends or otherwise by the defendant, applicable to said shares. (R., 93.)

Thereafter, an order was issued appointing Joseph Kahn, Esquire, to take the accounting. (R., 91.)

The accounting continued to January, 1929.

In January, 1929, the defendant discovered (R., 91) that the plaintiff had fraudulently and surreptitiously suppressed evidence. That is, on November 23, 1925, the plaintiff, Edward H. Titus, and one London I. Wallick, estranged brother of the defendant, drafted and executed a written agreement whereby the plaintiff, Edward H. Titus, agreed to prosecute this claim against the defendant and then if the plaintiff was not successful, London I. Wallick was to prosecute some alleged claim of his against the defendant and then they were to share fifty-fifty in the results of either action. (R., 93.) The plaintiff had, on the original trial, been questioned as to whether or not he had made any agreement with London I. Wallick about the case or about the claims and he absolutely denied that any such agreement had been made. (R., 104.) **The defendant on this ground moved for a vacation of the judgment and for a new trial and the trial court held that the plaintiff, Edward H. Titus, had perpetrated a fraud upon the court.** (R., 101.) **The judgment was vacated long after term.** (R., 88.)

The second trial of the New York case in December, 1930, again resulted in a dismissal of the complaint. (R., 120.)

Thereupon, the plaintiff appealed to the Appellate Division and the Appellate Division, again upon the printed record reversed the trial court, rendered judgment of ownership in the plaintiff of the stock and ordered an accounting. (R., 129.)

Thereupon, the defendant appealed to the Court of Appeals which affirmed the Appellate Division without opinion. (R., 80.)

On May 11, 1932, an order of reference was made appointing Edmund McCarthy, Esq., to take the accounting.

McCarthy in his report of February 24, 1933, found no sums due from the defendant to the plaintiff. (R., 115.)

Thereafter, the referee's report was refused by the trial court (R., 114) and a second referee, Jeremiah T. Mahoney, was appointed by the Appellate Division. (R., 134.)

Referee Mahoney thereafter made a finding that the defendant had "wrongfully" withdrawn or caused to be withdrawn, (by way of alleged incorrect accounting in amortizing a lease, alleged excessive salaries to officers, alleged improper stock purchases, etc.) one million, fifty-nine dollars and twelve cents ($1,000,059.12) from the funds of The Secor Hotel Company to which he added five hundred and eleven thousand, two hundred and twenty-six dollars and nine cents ($511,226.09) interest and then proceeded to find that the plaintiff was entitled to one-fourth (¼) of that amount directly from the defendant **entirely disregarding The Secor Hotel Company and the fact that it was not a party to the case.** (R., 135.)

The finding of Referee Mahoney was approved by the Supreme Court by opinion, the opinion being as follows:

> "The opinion of the learned referee in which he lucidly states the basis of every ruling he has made is a complete answer to every point made by the defendant in opposition to the motion to confirm the

report. The report is confirmed. Submit judgment. Dated April 13, 1934. E. J. McG." (R., 136.)

Thereupon, judgment was entered up against the defendant for $389,103.21. (R., 19.)

On appeal to the Appellate Division, the Appellate Division affirmed the Supreme Court. (R., 78.)

The petition in the case at bar was filed in the Common Pleas Court of Franklin county, Ohio, on August 20, 1934. (R., 1.)

The Affidavit, the Assignment and the Fraud.

In 1934 after the judgment sued on by plaintiff was recovered in the New York courts, London I. Wallick, estranged brother of Lou C. Wallick, the defendant, brought an action in New York against Edward H. Titus, the plaintiff herein, London I. Wallick claiming that he owned a one-half (½) interest in the judgment sued upon herein and asked for a temporary restraining order enjoining Edward H. Titus from disposing of the judgment or the proceeds. (R., 137.) London I. Wallick based his claim upon the aforesaid agreement between him and Edward H. Titus of November 23, 1925. In opposition to the application of London I. Wallick for that restraining order, Edward H. Titus, defendant therein and plaintiff herein, made an affidavit dated August 17, 1934, Defendant's Exhibit No. 7 (R., 137), which his attorneys filed September 7, 1934, in the New York case on behalf of Edward H. Titus, plaintiff herein.

Note: The petition at bar was filed August 20, 1934.

In said affidavit (Defendant's Exhibit No. 7) Edward H. Titus deposes as follows (R., 141):

> "I told him at that time (meaning November 23, 1925) that **I had already assigned any interest in the proceeds of said action against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

Edward H. Titus further deposes as follows (R., 145):

> "His retention of said sum of $2,500.00 is likewise consistent with my statement that the plaintiff herein knew in November, 1925, and prior to the execution of the instrument of November 23, 1925, **that I had assigned my interest in the case against Lou C. Wallick to Walter L. Titus and Emilie F. Titus.**"

Edward H. Titus deposes further as follows in said affidavit (R., 145):

> "The plaintiff's application for an injunction pendente lite should be denied. Prior to my execution of the instrument of November 23, 1925, **I assigned my interest in my claim against Lou C. Wallick to Walter L. Titus, my brother, and Emilie F. Titus, my wife.** The plaintiff herein knew of this assignment before the instrument of November 23, 1925, was executed. It is respectfully submitted that **it does not lie within the jurisdiction of this court to now enjoin what has already been accomplished.**"

This affidavit (Defendant's Exhibit 7) (R., 137), made in 1934, shows that Edward H. Titus has no interest whatever in this judgment and that he assigned away all of his interest in the claim prior to the time the suit was instituted in New York.

In connection with plaintiff's motion herein in the trial court to strike defendant's answer from the files, on the ground that it was a sham, defendant produced the said affidavit, Exhibit 7, and **then petitioner for the first time** produced the two instruments discussed by petitioner in his brief (Defendant's Exhibit 8 and Plaintiff's Exhibit D) (R., 32, 147, 83). The first instrument dated March 31, 1924 (R., 147), is an absolute assignment from Edward H. Titus to Walter L. Titus of the entire claim. The second instrument dated December 1, 1925 (R., 83), is a power of attorney from Walter L. Titus to Edward H. Titus, the purpose of which, as expressed in the third "whereas" paragraph, was an attempt to authorize Edward H. Titus to bring suit. An analysis of the instrument of December 1, 1925, is:

1. The instrument of December 1, 1925, is no more than a bare power of attorney to Edward H. Titus to collect the claim and to bring suit.

2. It expressly appoints Edward H. Titus "true and lawful attorney" for Walter L. Titus with powers of substitution.

3. It provides that Edward H. Titus will receive the stock and money **"as property of" Walter L. Titus** and will immediately endorse, deliver and transfer the same to Walter L. Titus.

4. If a trust has been created by the instrument of December 1, 1925, **the trustee is Walter L. Titus. If Edward H. Titus has any interest whatever in the judgment and claim, it is merely contingent.** The power of attorney was to authorize Edward H. Titus to bring an

action, nothing more, and the **power was not incidental to other powers or duties given to Edward H. Titus.**

However, the affidavit (R., 137) of Edward H. Titus of August 17, 1934, shows conclusively that he, Edward H. Titus, after his assignment to his brother, no longer had or claimed any interest in the claim. The affidavit denies that he has any interest in the claim or judgment.

As stated by Judge Hornbeck of the Court of Appeals for Franklin county, Ohio, in his opinion, concurred in by the remaining Judges Barnes and Geiger **the second instrument which was executed December 1, 1925,** just before the suit in New York was instituted, **gave the plaintiff, Edward H. Titus, no authority whatever under the New York law or under the Ohio law to prosecute the action in his name.** (R., 178, 189.)

At the institution of this case in the Common Pleas Court, Franklin county, Ohio, plaintiff was not the real party in interest. The trial judge made the following finding:

> "3. The court finds as a conclusion of law that the plaintiff herein is not the real party in interest in this action and has no right to maintain this action in his name." (R., 163.)

The Court of Appeals in its decision stated:

> **"With the finding that the plaintiff was not the real party in interest in the action in Ohio and in New York we are in accord upon a fair consideration of the status of the plaintiff, his brother and the defendant."** (R., 180.)

This finding by the trial court and affirmed by the Court of Appeals and undisturbed by the Supreme Court, constituted a local question of procedure involving the construction and interpretation of the procedural real party in interest statute of the state of Ohio and in no way involved the full faith and credit clause of the United States Constitution.

At the time of the institution of the New York case, plaintiff had assigned away his claim. Although the New York law required that the action be prosecuted in the name of the real party in interest, the plaintiff prosecuted the action in his name although he had no interest in the same and represented himself throughout the action to be the real party in interest and suppressed the fact that he was not. (R., 163, 189, 190, 107, 104, 119.)

On the witness stand in the case in the state of New York, Edward H. Titus testified and represented that he was the only one interested in the alleged claim. (R., 107.)

The trial court below, Judge Leach, made the following finding of fact (R., 163):

> "9. That at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claim against the defendant therein sued upon and **plaintiff in and during said litigation suppressed and concealed that fact from the court and from the defendant.**"

As conclusions of law the trial judge made the following findings (R., 164):

> "4. That the **plaintiff's judgment** procured in the courts of New York **was procured through fraud practiced upon the New York courts and upon the defendant**, in that at the institution of the suit in which the plaintiff recovered said judgment, and at all times during the litigation of said suit, the plaintiff was not the real party in interest and did not own or have any interest in the alleged claims against the defendant therein sued upon and had no right to prosecute said suit on the same in his name.
>
> "5. That during said litigation in the courts of New York, **the plaintiff suppressed and concealed the fact that a person or persons other than himself owned the claims** upon which suit was brought in his name and were the real parties in interest in whose name or names alone suit could be rightfully prosecuted.
>
> "6. That the **said judgment** so obtained in the state of New York was and **is impeachable there for fraud and it was and is to the same extent impeachable in the courts of Ohio.**"

After the decision of the trial court was announced plaintiff filed a motion for new trial, assigning certain errors. For some reason this motion has been omitted in printing the record. A copy of the motion is attached to this brief as Appendix A. No constitutional question is raised by those assignments.

In appealing to the Court of Appeals in Ohio it was necessary for plaintiff to specify the claimed errors to be reviewed. No constitutional question is raised by those assignments. (R., 176.)

When this case came to the attention of the Supreme Court of Ohio, no constitutional question had been properly raised and there was no basis for review on that ground. And since the Supreme Court of Ohio had in **Brown v. Ginn**, 66 O. S., 316, construed the real party in interest statute (a purely local question) squarely on the points raised, there remained nothing for the Ohio Supreme Court to review. Hence the motion before it, to certify up the record, was properly denied.

Issues at Bar Below.

The issues were three in number as follows:

I. The purported judgment in the New York proceedings is not responsive to the issues tendered by the pleadings, nor to the matters actually controverted.

II. **The plaintiff in the action at bar in the Common Pleas Court, Franklin county, Ohio, was not the real party in interest.**

III. The purported judgment in the New York proceeding was procured through fraud practiced by the plaintiff upon the New York court and upon the defendant in that plaintiff was at no time the real party in interest and he surreptitiously suppressed and concealed that fact.

The trial court found against the defendant on the first issue. The trial court found in favor of the defendant on the second and third issues and the trial court was affirmed by the Court of Appeals, in which affirmance the three judges of the Court of Appeals concurred. The Supreme Court of Ohio refused to review.

The action was for a personal judgment against the defendant, predicated on the pleaded judgment obtained in New York. The federal Constitution, of course, provides that full faith and credit shall be given in each state to the judicial proceedings of every other state. There is no debatable question about that. The issues, however, were, second, whether plaintiff could sue in his name in an Ohio court, and, third, whether or not the plaintiff had procured the judgment in the New York courts through practicing fraud on the court and on the defendant in the procuring of the judgment. **The second issue was a local question.**

As to the third issue, **if the fraud was practiced on the court and on the defendant in the procuring of the judgment, then the plaintiff has no judgment to which any faith or credit is to be given. There is no debatable or substantial question about that. The trial court held as a matter of fact that the plaintiff had practiced a fraud on the defendant and on the New York court in procuring the New York judgment,** and the trial court found as a matter of law that for that fact the judgment is impeachable in New York as well as elsewhere. **The Court of Appeals properly affirmed these findings by a unanimous decision.** The third from the last paragraph of the opinion of the Court of Appeals is as follows:

> "It is our judgment that the trial court properly applied the law in the determination that the plaintiff suppressed and concealed from the court and from the defendant the fact that he was not a proper party plaintiff and the real party in interest in the action against the defendant in New York, and in finding that such conduct was extrinsic fraud in prosecuting the cause to judgment, which supported the third defense of the answer." (R., 190.)

ARGUMENT.

SUMMARY OF ARGUMENT.

Proposition I. There is an independent ground of state procedure as the basis of the decisions below involving no federal question, and broad enough to sustain the judgment.

Proposition II. The trial court, sitting as a jury, found that the plaintiff as such in the Ohio court, was not the real party in interest under the Ohio statute. The trial court found further that the plaintiff in the New York proceeding had perpetrated a fraud upon the New York courts and upon the defendant in obtaining the alleged judgment sued upon in Ohio. These facts were not disturbed by the reviewing courts of Ohio.

Proposition III. Where fraud is practiced by a party in procuring a judgment, the judgment is assailable on that ground in a sister state and without first making application to the court rendering the judgment.

PROPOSITION I.

The Ohio Courts Decided Against the Petitioner on an Independent Ground of State Procedure.

This court in the case of **Gaar, Scott and Company v. Shannon**, 223 U. S., 468 at 470, lays down the following rule:

> "For as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of

> general law broad enough to sustain the judgment, this court will not consider the federal questions, even though they may have been actually considered and determined adversely to his contention."

And in **Hammond v. Johnson**, 142 U. S., 73 at 78, the court had earlier made the following observation:

> "It is well settled that where the Supreme Court of a state decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

The plaintiff petitioner in the Common Pleas Court of Franklin county, Ohio, started this action by filing a petition against the defendant asking for a money judgment.

The procedural statute of Ohio provides that an action must be prosecuted in the name of the real party in interest.

Section 11241 of the **Ohio General Code** is as follows:

> "An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections. When a party asks that he may recover by virtue of an asignment, the right of set-off, counter-claim, and defense, as allowed by law, shall not be impaired."

Section 11244 of the **Ohio General Code** is as follows:

> "An executor, administrator, or guardian, a trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute,

may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law."

These sections of the Ohio statutes had been construed by the Supreme Court of Ohio prior to the institution of the action at bar and particularly in the case of **Brown v. Ginn**, 66 O. S., 316.

To the petition of the plaintiff petitioner, the defendant in the trial court, pleaded a separate and distinct defense that the plaintiff was not the real party in interest and therefore could not prosecute this action in Ohio in his name. The trial court on the evidence, and sitting as a jury by consent of the parties, found that the plaintiff was not the real party in interest in the action at bar under the law of the forum, and therefore, could not maintain this action in his name. This question was one of local procedure under the state statutes and as construed by the decisions of the Supreme Court of Ohio. The trial court on this question was affirmed by the Court of Appeals for Franklin county, Ohio, and the Supreme Court of Ohio refused to review.

In the assignments of error, filed in the Court of Appeals for Franklin county, Ohio, no federal question was raised. (R., 176.) The errors assigned are characterized by that court in the fourth paragraph of its opinion as follows:

"There are fourteen errors assigned, which may be grouped under the general headings that **the judgment is contrary to law and against the manifest weight of the evidence**; the court erred in admitting

> certain evidence; in the conclusions of law and fact and in refusing to find 'whether a reassignment of the claim (upon which the judgment in New York was rendered) was made by Walter L. Titus to Edward H. Titus on December 1, 1925.'" (R., 179.)

After the Court of Appeals had concurred in the findings of the trial court and in the legal conclusions reached by the trial court, the plaintiff petitioner took two courses of procedure in going to the Supreme Court of Ohio: first he filed a motion in the Supreme Court of Ohio asking for an order "directing said Court of Appeals to certify its record to the Supreme Court" on the ground "that said case is one of both public and general interest" within meaning of Article IV, Section 2 of the Ohio Constitution, and with that motion he filed assignments of error in which for the first time, the plaintiff petitioner specifically claimed that a federal question was involved in the way of violation of the full faith and credit clause of the United States Constitution; second, the plaintiff filed in the Supreme Court of Ohio an appeal as of right on the ground that "a debatable constitutional question" was involved. The defendant respondent then filed a motion to dismiss the appeal as of right. The Supreme Court of Ohio, without opinion, dismissed the appeal taken as of right and overruled the motion to certify.

Either of two propositions of local Ohio law would have disposed of the appeal as of right in the Supreme Court of Ohio:

> "If the constitutional question claimed to be involved in the case is not submitted to or decided by

the Court of Appeals, the motion to dismiss should be sustained."

Hoffman v. Staley, 92 O. S., 505,

"If the record * * * does not show that the disposition of the case requires the consideration of any constitutional question, it will be dismissed for want of jurisdiction."

2 O. Jur., 63.

As to the motion to certify, there was no question of public or general interest for the consideration of that court for the very good reason that the Supreme Court of Ohio had previously in Brown v. Ginn, supra, decided the procedural question involved and consequently that question was foreclosed against the plaintiff petitioner.

Hence it does not appear that the Supreme Court of Ohio dealt with any federal question, but on the contrary, based its ruling on the question of local procedure.

In this connection we quote from Volume 5 of Hughes Federal Practice, page 315:

> "A federal question, although referred to in the assignments of error in the state appellate court and in the Supreme Court of the United States, cannot be considered by the latter where it does not appear that the state court dealt with the question, and where it appears that the state court may have refused to deal with it on the ground that it was not raised in the trial court."

This court in the case of **Whitney v. California**, 274 U. S., 357 at 360, spoke as follows:

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and **expressly or necessarily decided by such state court.**"

No federal question was **expressly** decided by the Supreme Court of Ohio and no federal question was **necessarily** decided by the Supreme Court of Ohio for there was an independent ground for the decision of the trial court as well as of the decision of the Court of Appeals for Franklin county which ground involved no federal question, and hence the Supreme Court of Ohio could have disposed of and in all probability did dispose of the case on that independent ground which involved no federal question.

Where it does not appear upon which of two grounds the decision was based, whether the federal or non-federal ground, then if the independent ground on which it might have been based was a good and valid one, sufficient to sustain the judgment, this court will not assume jurisdiction.

Klinger v. Missouri, 13 Wall., 257.

PROPOSITION II.

The Decisions of the State Courts Rest Upon a Finding of Facts Made by the State Trial Court.

In the case at bar the trial judge sitting as a jury with the consent of the parties, made a finding of facts at the special written request of the plaintiff petitioner. It was found from the evidence that the plaintiff petitioner was not the real party in interest in the Ohio court. It was also found that the judgment sued upon was procured through fraud practiced upon the defendant and upon the New York courts by the plaintiff petitioner. The Court of Appeals for Franklin county, Ohio, weighed the evidence and stated in its opinion that it was in accord with the findings of the trial court. Ample evidence supports those findings.

This court in the case of **Ry. Co. v. Donaldson, Administrator**, 246 U. S., 121 at 124, spoke as follows:

> "The record shows testimony supporting the verdict, and that is as far as this court enters upon a consideration of that question."

PROPOSITION III.

Where Fraud is Practiced by a Party in Procuring a Judgment, the Judgment is Assailable on that Ground in a Sister State and Without First Making Application to the Court Rendering the Judgment.

In the first trial of the New York case the plaintiff petitioner testified that he was the only one interested in the case. (R., 108.) Long after judgment against the defendant pursuant to the first trial there, in the New York courts, the defendant discovered that plaintiff and London Wallick, estranged brother of defendant, had prior to the institution of the New York suit, entered into a fifty-fifty split agreement to divide the proceeds of the New York suit and further that if the plaintiff was unsuccessful, then London Wallick would start some kind of a suit against the defendant and Titus would share fifty-fifty in the proceeds of that litigation. (For fifty-fifty agreement see R., 104.)

Justice Valente, on motion of defendant for a new trial in the New York Supreme Court, held that the plaintiff had in suppressing this fifty-fifty agreement, practiced fraud upon the court and upon the defendant and he set the judgment aside. (R., 90.)

Then on the second trial, the plaintiff in half truths and by misleading testimony, knowing that counsel for defendant was under the mistaken impression that some kind of an agreement had been made after the New York

suit had been filed, suppressed the fact of his assignment to his brother which had been made twenty-one (21) months before the New York litigation had been started. (R., 119.)

Then in 1934 at the time the action at bar was started in Ohio, the plaintiff filed his affidavit, Defendant's Exhibit 7 (R., 137), in the London Wallick action in New York for injunction, in which affidavit the plaintiff deliberately states that prior to November 23, 1925, he had assigned away all of his interest in the claim, to his brother and wife and that he, the plaintiff, **no longer had any interest in the judgment or in the claim.**

When the plaintiff was confronted in the Ohio court with the affidavit, then plaintiff came forward for the first time with the assignment, Defendant's Exhibit 8, and the writing, Plaintiff's Exhibit D. (R., 32.)

Then the plaintiff proceeded to contend that in spite of the affidavit and the assignment he was still and always had been the real party in interest, and that any way the matter was res judicata even though the plaintiff had suppressed the fact and defendant had not discovered it. This contention has been made by counsel and not personally by petitioner who has not dared to attempt an explanation from the witness stand.

Judge Leach of the trial court in his opinion, stated it was not necessary for him to determine whether or not Defendant's Exhibit D (R., 83), constituted a reassignment, for subsequent to the date thereof, the plaintiff filed the affidavit (R., 137) in the London Wallick case, which in substance stated that it was beyond the power

of the court to enjoin him from disposing of, encumbering, pledging, assigning, or in any manner dealing with the moneys received or to be received on account of the judgment in his favor against Lou C. Wallick, the thing had been done, he says, before the injuction had been sought, and he himself states this to be the fact.

Quoting the decision of Judge Leach again (R., 156): "But the affidavit says by way of deliberate and inescapable implication that prior to November 23, 1925, he had assigned his claim to his brother and to his wife, and that on the date of the affidavit, such assignments were in effect."

The trial court could find no explanation of the affidavit and the trial court found from the evidence that the judgment upon which this action is based "was obtained by fraudulently concealing from the court in which the judgment was obtained, the facts contained in the affidavit, and such judgment would be impeachable there for such fraud." (R., 156.) The judgment being impeachable for fraud in New York on this ground, of course, is impeachable in Ohio and the trial court so found.

If it had been necessary for the trial court in the case at bar to have determined the legal effect of Plaintiff's Exhibit D, the court on the facts and the law would have had to have found as the Court of Appeals did find that Exhibit D was not such an instrument as would permit the plaintiff to maintain the New York action in his own name. The apparent purpose of Exhibit D was an attempt to permit the plaintiff to maintain this action

in his name and for an ultimate purpose to conceal from the court and from the defendant the fact that the plaintiff had no interest of any kind in the alleged claim against the defendant. If such an instrument would permit an "assignee" to prosecute and maintain an action in the name of the "assignee" then the real party in interest statutes of New York and Ohio mean nothing. We have analyzed Exhibit D, supra, page 9.

One way to characterize the issue in this case is to put it this way: may a party for his benefit, say to one court, "I have no interest in this claim or judgment," and at the same time say to the court of the sister state, "the claim and judgment is mine." This is a simple proposition as to whether or not there is any rule of good words and whether a party may at his whim repudiate and deny that which he has solemnly stated and that which his written documents bear out.

Briefly, we call attention to the New York law on the question of the New York real party in interest statute. Section 210, **Civil Practice Act of New York**, pleaded in amendment to amended answer and admitted by plaintiff in reply, is as follows:

> "Section 210. Action to be brought in name of real party in interest. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, a person with whom or in whose name a contract is made, for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

Spencer v. Standard Chemicals & Metals Corporation

143 N. E., 651; Ct. of App. N. Y., 1924 (237 N. Y., 479):

"Syllabus 1. Under Code Civil Procedure Sections 111, 113 (Civil Practice Act, Section 210), assignee must have legal or equitable title to thing assigned to sue in his own name as real party in interest, irrespective of consideration paid, purpose of assignment, or use to be made of proceeds collected.

"Syllabus 2. One empowered by instrument to prosecute suits for recovery of debts, etc., due the maker, in name of either, held not trustee of express trust, or assignee of legal title or equitable interest, but mere attorney in fact, not authorized to sue in his own name as real party in interest, under Civil Practice Act, Section 210."

Page 652: "Andrews, J. When we adopted our scheme of reformed practice, one purpose being to end in part the ancient distinctions between law and equity, we provided that every action must be prosecuted in the name of the real party in interest. Code of Procedure, Section 111. A few exceptions were made. A trustee of an express trust, for instance, might still sue without joining with him the person for whose benefit the action is prosecuted and later such a trustee was defined to include one with whom or in whose name a contract is made for the benefit of another. Code of Procedure, Section 113. Theretofore, as the commissioners on practice and pleadings pointed out in their report, if the assignee sued at law he was turned out of court, and if the assignor sued in equity he was turned out also. So the rule adopted in courts of equity was made general, 'that he who has the right is the person to pursue the remedy.' First Report, page 124. It was not the design to give a new cause of action where none previously existed, but to permit and require the beneficial owner to enforce his rights in his own name.

"The real party in interest has been defined by this court: 'If, as between the assignor and the assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest.' Cumings v. Morris, 25 N. Y., 625.

"In other words, the plaintiff must have some title, legal or equitable, to the things assigned. Hays v. Hathorn, 74 N. Y., 486. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made, of any proceeds collected, is immaterial. Allen v. Brown, 44 N. Y., 228; Meeker v. Claghorn, 44 N. Y., 349; Sheridan v. Mayor, etc., of New York, 68 N. Y., 30; Brown v. Powers, 53 App. Div., 251, 65 N. Y. Supp., 733. But legal title or equitable interest he must have.

"This action is brought by Harold R. Spencer to recover the balance of the purchase price of certain ore said to have been sold by one Quan Kai to the defendant. It was alleged in the complaint that the cause of action had been duly assigned to the plaintiff. This was denied. At the close of the plaintiff's case the purported assignment was offered in evidence. This instrument named Spencer as attorney for Quan Kai, and gave him, among other things, 'power to commence or prosecute any suit or action or other legal proceedings for the recovery of damages, * * * debts, demands, choses in action, causes or things whatsoever in the United States of America due or to become due to me and to prosecute and follow and discontinue the same if he shall deem it proper and for me and in my or his name to take all steps and remedies necessary and proper for the recovery * * * of any * * * sum or sums of money, choses in action or other things whatsoever that is, are, or shall be by my said attorney thought to be due * * * to me in my right or otherwise, and also for me and in my name to compromise, settle, and

adjust all causes. The attorney was also authorized to sign any release or receipt and he was given power to substitute other attorneys in his place. When this instrument was offered in evidence objection was made that it was not competent because it did not constitute an assignment but was a mere power of attorney. The attention of the trial judge was therefore sharply called to this question. The paper was received in evidence and an exception taken.

"The plaintiff is clearly not within any of the definitions of the trustee of an express trust. No legal title to the claim against the defendant was assigned to him. Neither does it appear that he has any equitable interest therein. **Upon the face of the paper the attorney's duty is simply to collect what may be due to Quan Kai solely for the latter's benefit and to transmit it to him.** It is the ordinary case of the appointment of an attorney in fact. **The attempt to authorize such attorney to sue in his own name is**, under the provisions of Section 210 of the Civil Practice Act, which in this respect follows the original code, **entirely unavailing.**"

Banca v. Clarkson, 274 N. Y., 69, cited by counsel, is not helpful for the reason that the facts and circumstances of the agreement before the court do not appear from the reported opinion. The court stated that from the record the plaintiff was trustee of an express trust.

The Supreme Court of Ohio has considered this situation in **Brown v. Ginn**, 66 O. S., 316, in construing the Ohio real party in interest statute which is similar if not identical to the New York statute. At pages 322 et seq. the Ohio Supreme Court has this to say:

"And we conclude further that in order to constitute the party a trustee of an express trust within

the meaning of Section 4995, **the right and duty to bring an action must be incidental to other powers and duties under the assumed trust**, and the authority not confined simply to the bringing of an action to collect the subject of the contract which purports to create the trust, and pay the net proceeds over to the assignor. **Such a contract is rather one of agency**; it is not one which creates an express trust within the meaning of this statute."

The rule in Brown v. Ginn is affirmed in Hadden v. Rowe (Sup. Ct. of Ohio), 3 O. O., 68, 70.

The case at bar is even stronger than the case of Brown v. Ginn. The instrument of March 21, 1924, is an absolute assignment to Walter L. Titus. The instrument of December 1, 1925, is an instrument of agency naming Edward H. Titus agent for Walter L. Titus to collect the claim and, if necessary, bring suit. **As soon as the stock or money, or both, should be recovered, Edward is to immediately turn the same over to Walter "as property of" Walter.** Hence **under this arrangement, Edward does not have even a contingent interest.** Edward is certainly not the **real** party in interest. Edward is not a trustee under any express trust for as in Brown v. Ginn he is to immediately deliver the proceeds over to Walter. To constitute Edward a trustee, the right and duty to sue, must be incidental to other powers and duties under the assumed trust. Here the right to sue is **the** power and duty delegated. If the instrument of December 1, 1925, creates a trust, the trustee is not Edward, but Walter. Walter is the person who is to administer the "corpus," not Edward. If a person can be

authorized to bring suit in his name on the basis of such a paper as that of December 1, 1925, then the real party in interest statutes mean nothing.

Now, reading the affidavit in the light of Exhibits 8 and D, the conclusion cannot be escaped that Edward, the plaintiff, had no interest in the alleged claim after a date prior to the institution of the New York litigation and that at the time this action was instituted in the Common Pleas Court of Franklin county, Ohio, the plaintiff was not the real party in interest or a trustee within contemplation of the real party in interest statutes.

Petitioner in his brief, top of page 12, starts off with a proposition taken from **Freeman on Judgments, Fifth Edition**, and from that proposition weaves his argument. The mistake which the petitioner has made is that he is quoting from that portion of Freeman's work which deals with **domestic judgments** as distinguished from sister state judgments. Freeman annotates authorities holding that in the forum where the judgment is procured, the attack on that judgment must be made in accordance with the local procedure and not collaterally. "The law of every jurisdiction prescribes the manner in which litigants must proceed to correct, vacate, review or annul judicial decisions." Section 306 of Freeman. (However, as the author points out, there are cases where **domestic** judgments have been successfully attacked collaterally in their forum on the ground of fraud in the procurement.) This rule which Freeman says applies to domestic judgments and which the petitioner mistakenly relies upon is quite different as to sister state judgments,

the author, **Freeman, Fifth Edition, Section 1401,** rly distinguishes: **"Notwithstanding the contrary as applied to domestic judgments,** many cases either l or contain dicta to the effect that **sister state and ign judgments may be attacked collaterally for ud** * * *. If it is impeachable there (where rendered) fraud it is to the same extent impeachable elsewhere." nd from Section 1402, page 2893 of **Freeman's** work quote the following which we deem very helpful:

"While the United States Supreme Court has indulged in dicta to the effect that such a judgment may be attacked for fraud, as well as lack of jurisdiction, other dicta of the same court are to the contrary, and some of its decisions contained the general statement that the plea of fraud is not available as an answer to an action on a judgment. We apprehend, however, that **these latter decisions are inapplicable in those states in which the distinction between law and equity is attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law."**

he last sentence in the above quotation is particularly licable to the situation at bar. For instance, this rt in **Christmas v. Russell,** 72 U. S., 290, further comted upon infra, seemed to think that an attack of the ure made at bar would have to be raised on the chan- side. However, in Ohio we now have no chancery , no distinction between equity and law. Section 5 of the Ohio General Code is as follows:

"The defendant may set forth in his answer as many grounds of defense, counter-claim and set off as he may have, whether such as heretofore have been denominated legal or equitable, or both * * *."

In Ohio practice, subject matter which could be the basis of a bill in equity may be set up purely as a plea in defense. **Raymond v. Railway Co.**, 57 O. S., 271, at 28[illegible]:

> "Nor can it be reasonably claimed that the plaintiff's case is changed, or in any way aided, by the answer. That pleading, besides general denial and plea of the statute of limitations, sets up an equitable defense by way of estoppel. But it is common knowledge that this may be done under our statutes, Sections 5071 and 5782. It seems equally well settled that, unless a new, affirmative case is made by the defendant which requires a trial in advance of a trial on the plaintiff's cause of action, and, if found in favor of the defendant, would wholly supersede plaintiff's claim, the trial of the case made by the plaintiff is not affected. The equitable plea in this answer is a defense merely. If found in favor of the company, the effect would be simply to defeat a recovery."

This court in **Cole v. Cunningham**, 133 U. S., 107, at 112, refers with approval to the proceeding in Dobson v. Pearce, 12 N. Y., 156, where the plaintiff in a judgment recovered in New York, brought an action upon it in Connecticut, whereupon the defendant filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment was procured by fraud and praying relief. The equity suit was litigated and the judgment creditor was enjoined from prosecuting the judgment. He assigned the judgment but in a suit by the assignee in New York it was held that the Connecticut decree was conclusive, that the judgment was obtained by fraud. Thus is demonstrated what Freeman says (in regard to the sometime state[illegible] rule that a plea

of fraud is not available as an answer to an action on a judgment), that the rule is not applicable in those states in which the distinction between law and equity is attempted to be abolished. Under the Ohio practice the defendant was not required to file a separate bill in equity for the simple reason that under the Ohio practice the subject matter of the equitable bill was properly set up as a defense to the action at law. See Kingsbrough v Tonelli 0.S.450 ab.

The petitioner makes further what seems to us to be a violent assumption in making his argument to wit, that the attack on the judgment at bar is a collateral attack. It is not always an easy matter to determine whether an attack is direct or collateral. If the object of a proceeding is incidental to the judgment, an attack on the judgment in that proceeding then is collateral. **Freeman**, page 607. However, in the case at bar the object of the proceeding according to counsel (page 2 of petitioner's brief) was "for the purpose of making the judgment of the Supreme Court of the state of New York a judgment in the state of Ohio." The attack was an affirmative answer to the effect that the New York judgment was of no force because it was procured through fraud. This it seems to us is a direct, not a collateral attack. If the procedure followed would have been as described in the case of Dobson v. Pearce above referred to herein and commented upon by this court in Cole v. Cunningham, a separate bill in equity would have been filed, and this would have constituted a direct attack. However, under the Ohio practice the subject matter of the bill in equity was properly set up as a defense to the action at law

based upon the judgment. Consequently, we submit that this was a direct attack upon the judgment.

On the impeachability of a foreign judgment, the general rule is stated in 15 R. C. L., page 935, as follows:

> "But **the weight of authority today is that a judgment of another state**, relied on as a cause of action, **may be impeached on the ground that it was obtained by fraud**, unless the parties raising the question of fraud are estopped from availing themselves of it by reason of participation in such fraud."

The court of last resort of the state of New York in **Gray v. Richmond Bicycle Company**, 167 N. Y., 30, recognizes that application need not be made to the court rendering the judgment in order to assail the same on the ground of fraud in the procurement thereof. The following is syllabus three of that case:

> "Relief from fraudulent foreign judgment may be granted by courts of this state. **Relief may be obtained from the judgment, if fraudulent, without the application to the courts of the other state**, and it cannot be indirectly enforced as a bar to the action, since a court of this state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state."

A judgment may be attacked any time, anywhere, for fraud practiced as in this case in prosecuting the action. This is well recognized in the above New York case as well as in **Martin Corley, infant by Walter Duncan, his Guardian ad litem, v. New York and Harlem Railroad**

Company, App. Div. Sup. Ct. of N. Y. 1896; 12 App. Div. (N. Y.), 409, pages 410-411:

"On the ground of fraud practiced upon the court and jury during the trial, the judgment should be set aside and a new trial granted. It was said in Ward v. Town of Southfield (102 N. Y., 287) by Earl J.: 'A party defeated in a litigation may appeal from the judgment or move for a new trial, and, in a proper case, to vacate and set aside the judgment. These remedies are generally ample to protect all parties. But where there is fraud not in the subject of litigation, not in anything which was involved in the issue tried, but fraud practiced upon a party, or upon the court during the trial, or in prosecuting the action, or in obtaining the judgment may be attacked collaterally, and on account thereof set aside and vacated.' This is a case of 'fraud practiced upon a party * * * during the trial'; and if it is ground for a collateral attack, it is certainly ground for setting aside the judgment in the same action, as the Ward case plainly indicates. That case was cited and applied to the case of a motion in the same action, in Harris v. Ditson (13 N. Y. St. Repr., 337), a case decided by the General Term in this department."

Inslee as Administratrix, etc., v. Rochester and Syracuse Railroad Company, 214 App. Div. (N. Y.), page 680, is an example of fraud in prosecuting an action:

"A new trial will be granted in an action to recover damages for the wrongful death of plaintiff's intestate, her son, where it appears that the complaint alleged that the intestate left him surviving his mother, and did not allege that the father of the intestate, who had been divorced from the intestate's mother was living also, and did not on the trial bring that fact to the attention of the jury and in fact, fraudulently concealed the existence of the father and permitted associate counsel to refer to

the mother as a widow, and such fact was not discovered by the defendant until after the close of the trial and the entry of judgment."

Complainant alleged that the son was wrongfully killed and that the mother only survived him. No reference was made to the father. In the trial, plaintiff was constantly referred to as the "widow." The Appellate Division ordered a new trial, because the attorney of the plaintiff knew that the father was living and did not so state and further permitted the associate counsel to refer to the plaintiff as "widow." The court said on page 62:

"What effect such a statement several times repeated might have on the sympathies of the jury we do not know but the statement was made and was not supported by any evidence. In making this statement to the jury to the effect that plaintiff was a widow, counsel had no intent to deceive, for he was probably without knowledge as to the actual status of the plaintiff, but his reference to her as a widow was not based on any evidence in the case and was, therefore, improper.

"Good faith required that the fact that decedent left a father surviving him should have been disclosed either in the complaint or on the trial, but it is quite clear that there was an intent to conceal that fact and let the case go to the jury on the theory that the plaintiff was a widow and the sole next kin of decedent.

"Whether or not the father contributed to plaintiff's support is not important. **The fact that he was living** and, therefore, the plaintiff was not the sole next of kin of decedent **was surreptitiously withheld.** A judgment thus obtained should not stand. The court cannot approve a practice which in effect amounted to a legal fraud and a judgment thus tainted must be set aside. (Stevens v. C. N. Bank.

144 N. Y., 50; Wolff v. United Drug Company, Inc., 181 App. Div., 628.)"

In this very case in the New York courts, the New York courts held that suppression by Edward H. Titus the fact of his agreement with London I. Willick concerning a partial assignment of the claim, constituted a fraud upon the court. A fortiori the suppression by the plaintiff of the fact of an absolute and entire assignment, certainly constitutes fraud upon the New York courts as well as upon the defendant. (R-90)

In the case at bar, the judgment assumed the existence of a real plaintiff in interest. That issue was not raised or tried in the New York case because of the ignorance of the defendant and the surreptitious concealment of the facts by the plaintiff. Hence the doctrine of res judicata relied on by petitioner has absolutely no application. Now it appears that there was no real plaintiff in interest.

Counsel cite several New York cases to sustain their statement that a judgment will not be set aside or enforcement enjoined by reason of intrinsic fraud. We have no quarrel with that proposition. In Jacobwitz v. Herson, the unsuccessful party in an arbitration proceeding sought to set aside the award on the ground of perjury, that the successful party and his witness testified falsely on the issues. The court said that although perjured testimony alone is not sufficient to set aside a judgment, however, a judgment would be set aside where it has been procured through fraud or other undue means, which would include the fraudulent or improper conduct

of a party. In the case at bar, the plaintiff was guilty of fraudulent and improper conduct in the procurement.

Counsel rely upon the case of **Petroleum Associates v. Landers**, 182 Okla., 297. This was an action brought by a guardian of an incompetent to quiet title. The defendant urged that plaintiff had not been legally appointed, that the order of appointment did not show that the ward was present in court at the appointment. The statute provided that the person for whom the guardian was asked must be produced in court if able. The order of appointment was silent on this feature. The court said that the order raised a presumption that the ward was present or was unable to attend, and that the presumption was not subject to attack in the action to quiet title. Here a domestic judgment was involved.

Counsel rely upon **Johnson v. Petty**, 118 Okla., 17. This was a proceeding in equity in the District Court of Okmulgee county to set aside a guardianship appointment in another county on the ground that the application for appointment had set out untrue facts as to the residence and custody of the ward. The bill was allowed and the court (even though this involved a domestic judgment) held that relief would be given "where such fraud is extraneous to the issues in the proceeding attacked."

In the case of **Phillips v. Griffin**, 236 N. Y. App. Div. 209, relied upon by petitioner it was held to be error to dismiss the action on the judgment rendered by a Massachusetts court on the defendant's oral testimony that the judge in the Massachusetts court ruled that he

the defendant, was improperly served with summons. The statement of the New York court in regard to fraud is dicta, and furthermore, the New York court states at page 211:

> "If it was intended by the defendant to raise an issue of fraud, recourse must be had to a suit in equity."

We have already pointed out the distinction that in Ohio the subject matter of an equity bill may be pleaded as a defense to an action at law.

In matter of Holden cited by counsel, the assignments in question were as the New York court stated perfectly valid until legally set aside. The assignors by their act had vested legal title in the assignee. The fraud complained of was between the parties to the assignment and related to what the court characterized as a remote transaction. The fraud in the case at bar consists of plaintiff representing to the New York court and to the defendant that he was the real party in interest and of surreptitiously withholding and concealing the fact that he was not the real party in interest, when all the time he had not even a color of interest.

In the hypothetical case assumed in Harrington v. Denny, J. Otis sets forth the same kind of facts as in United States v. Throckmorton discussed infra and naturally reaches the same conclusion.

In Wright v. Saltmarsh, the court said "The contention that the decree of distribution was obtained by fraud in not disclosing the fact of the probate proceedings in the state of Kansas cannot be urged for the reason that

to disclose such proceedings would have no effect whatever upon rights of these parties in Oklahoma, and therefore the defendant owed no duty to the court to disclose to it what some other court in some other state had done with the property in that state." The court said further that the action was nothing more than an effort to avoid the decree of distribution on the ground of alleged false proof presented in the matter. In the case at bar the plaintiff not only testified falsely but in addition he suppressed and concealed and remained silent on the fact of which defendant was ignorant, that he the plaintiff had no interest whatever in the alleged claims against the defendant and hence had no standing whatsoever in court. The result was that the court had no real plaintiff before it.

On page 2582 of Freeman's Work, he discusses the rule of **some jurisdictions where perjury alone may constitute such fraud** as will invoke equitable relief against the judgment especially where there is willful perjury of or at the instigation of the successful party. **However, in the case at bar, there is something more serious than mere perjury.**

And in Freeman's Work at page 2895:

> "Hence relief can not ordinarily be had in another state on the ground of perjury and conspiracy in prosecuting the action in which the judgment was given, nor because of any fraud which might have been urged against the maintenance of the former action. The fraud which may be shown is fraud in the procurement of the judgment or decree rather than fraud in the cause of action. As to what constitutes such fraud the rule is doubtless the same as

is applied where equitable relief on this ground is sought against it in an independant action."

The fraud in Ward v. Town of Southfield, cited by counsel was intrinsic fraud going to the subject-matter of the litigation like the other cases cited by counsel.

It is noted that counsel omit from their reference to the **Southfield case** the following, appearing at the bottome of page 292 of the report (102 N. Y.):

> "But where there is fraud, not in the subject of the litigation, not in anything which was involved in the issues tried, but fraud practiced upon a party or upon the court during the trial, or in prosecuting the action, or obtaining the judgment, **then in a proper case the judgment may be attacked collaterally**, and on account thereof, set aside and vacated."

Neither do counsel in their reference to the **Southfield case** include the following appearing on page 293:

> "Neither party can mislead the other by any positive or actual fraud. **Nor can he**, for the purpose of perpetrating a fraud upon the other party, **conceal such facts as good faith and common honesty require him to reveal.**"

Note: The **Southfield case** is relied on in Corley v. Railroad Company, supra.

Counsels' cases deal with intrinsic fraud. With those cases we have no quarrel. However, they do not apply to the case at bar. **There seems to be an unanimity of opinion on the proposition that for extrinsic fraud a judgment of a sister state may be assailed at any time, anywhere** (excepting certain exceptions in forum where procured).

In **Armstrong v. Armstrong**, 117 O. S., 558, cited by appellant, the question was whether an order for alimony to be paid in future installments, entered by a Kentucky court, is within the protection of the full faith and credit clause. It was contended that the alimony order was not a final judgment. And as Judge Matthias stated "there has been much confusion, and contrariety of opinion" on that question. There is no confusion or contrariety of opinion concerning the question in the case at bar. The question is long and well settled and is not debatable.

After quoting the full faith and credit clause Chief Justice Fuller of this court speaks as follows: "This does not prevent an inquiry into the jurisdiction of the court in which a judgment is rendered, to pronounce the judgment, nor in the right of the state to exercise authority over the parties or the subject matter, **nor whether the judgment is founded in, and impeachable for, a manifest fraud**. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the state domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence."

Cole v. Cunningham (1889), 133 U. S., 107 at 112.

In **U. S. v. Throckmorton** relied on by petitioner, the full faith and credit clause was not in any remote degree involved. The fraud was in the very issues of the case, i. e., and antidated grant supported by depositions of per-

jured witnesses. The United States filed a bill in U. S. District Court of California to set aside adjudications of a board of commissioners of land claims and of that court affirming the commissioners. No such question as at bar was before the court. And this court has veered away from its dicta of the Throckmorton case for in **Hilton v. Guyot**, 159 U. S., 113 at 207, in commenting on the Throckmorton case, the court says with respect to fraud:

> "But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeals, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court."

After reciting the full faith and credit clause Van Devanter, J., states: "The effect of these provisions is that in the courts of other states the judgment of a court of one state is not impeachable except for fraud or want of jurisdiction * * *."

Lamb v. Stock Co., 132 Federal Rep., 431 at 441.

We quote the following from various jurisdictions:

> "Under Const. U. S., Art. 4, Sec. 1, judgments of a sister state are entitled to no greater credit than will be given thereto by the courts of the state where rendered, and may, in an action thereon, be impeached for want of jurisdiction or fraud in their procurement."

Cohen et al. v. Bromberg, Syl. 1 (Iowa 1919), 170 N. W., 478.

"Though, under Const. U. S., Art. 4, Sec. 1, judgment of Ohio court is entitled to same effect in tribunals of Kentucky that it is entitled to in Ohio, it can be attacked in Kentucky on any grounds that would invalidate it in Ohio."

Syl. 2, **Capper v. Short** (Ky. 1928), 11 S. W. (2d), 717.

"In other words, if the judgment is not conclusive, but open to a direct attack for fraud where rendered, it is also open to collateral attack on the same ground, when brought forward as a defense or a cause of action in the courts of a sister state."

Schendel v. Ry. Co., 210 N. W., 70 at 73 (Minn. 1926).

"Judgments, whether foreign or domestic may be attacked for want of jurisdiction in court trying same or for want of service or fraud in procurement"

Syl. 3, **Mendlovitz v. Shoe Co.**, 5 S. W. (2d), 559 (Texas 1928).

"Under full faith and credit clause of Const. U. S., Art. 4, Sec. 2 and Act of Congress (U. S. Comp. St. Sec. 1519) a judgment of one state sued on in another state may be impeached for fraud perpetrated in its procurement, if it might be so impeached in the state in which rendered, as in the case in Oklahoma"

Syl. 4, **Hare v. Reily** (Texas 1925), 269 S. W., 473.

"Judgment entered by court in sister state, and sued on in this state, may be set aside for fraud in obtaining it, notwithstanding Const. U. S., Art. 4.

Sec. 1, requiring full faith and credit to be given to judgment of sister state."

Syl. 3, **Dyer v. Johnson** (Texas 1929), 19 S. W. (2d), 421.

"The only defenses that can be made to a judgment obtained in another state, when sued on here, are that the court of our sister state did not have jurisdiction of the person or of the subject matter, or that it was fraudulently procured, or had been paid."

Syl. 1, **White v. Minder** (N. J. 1930), 148 Atl., 781.

"The full faith and credit provision of Const. U. S., Art. 4, Sec. 1, does not prevent an inquiry, when suit is brought in one state on a judgment rendered in another, whether the judgment is impeachable for fraud."

Syl. 1, **Ring v. Whiteman** (N. C. 1927), 140 S. E., 159.

"Judgments of other states are conclusive of all questions involved in them except fraud in their procurement, and whether the parties were properly brought before the court in view of Const. U. S., Art. 4, Sec. 1, and acts of Congress enacted in pursuance thereof."

Syl. 4, **Webb v. Friedberg** (N. C. 1925), 126 S. E., 508.

"Under constitutional requirement that each state give full faith and credit to public acts and records of other states, **full faith can only be given to that which is a result of good and full faith, and credit can only be given when and where act, record or proceeding is not tainted with dishonesty and fraud**

practiced upon the state issuing or participati
same."

Morris v. Morris (1936), 289 N. Y. S., 636, 8

"Judgment rendered by competent tribunal
ing jurisdiction is conclusive on merits in cou
another state unless fraud is established."

Syl. 2, **Franklin v. Lee**, 253 N. Y. S., 620 (1

"'Full faith and credit' clause and rule of co
of states were not intended to aid in perpetrati
fraud or wrong (Article IV, Section 1, U. S.
stitution)."

Syl. 6, **Larrick v. Walters**, 20 O. A., 363.

In **Christmas v. Russell**, 72 U. S., 290, relied o
petitioner, the action was on a note, the defendant b
a resident of Mississippi. By the Mississippi statute
action was barred after six years. Suit was had in K
tucky while defendant was visiting there. The Mi
sippi statute was set up in defense, but judgment
entered. A transcript was taken to Mississippi and s
on in the United States Court there. A further Mi
sippi statute provided that no action could be m
tained on a judgment rendered by a court without
state against a resident of Mississippi in a case wh
the action would have been barred in Mississippi.

This court held the above latter statute to be voi

It was also claimed that the judgment had been
tained in fraud of this statute. This court, page
seemed to think that the question of fraud would h
to be raised on the chancery side. And in this con

tion referred to **Anderson v. Anderson**, 8 Ohio, 108. In Ohio now as a matter of practice as we have treated at length supra (which was not the practice at the time Anderson v. Anderson was decided) a defendant is permitted in actions at law to set up legal or equitable defenses or both.

Since Christmas v. Russell was decided this court has in Cole v. Cunningham supra recognized the right of a state to inquire into the question of whether or not the judgment of a sister state was founded in fraud.

And as late as 1935 in **Milwaukee County v. White Co.**, 296 U. S., 268, at 276, this court has recognized that recovery on the judgment of a sister state can be resisted on the ground that it was procured through fraud.

Counsel (page 25 of petitioners brief) make some point claiming that the defendant had knowledge in 1929 of the fraud being perpetrated by the petitioner. To this claim made below, the Court of Appeals had this to say:

> "It is further claimed by the plaintiff that the facts upon which the trial court predicated the finding of fraud against the plaintiff were known or should have been known to the defendant during the progress of the litigation in New York and that it is too late to assert them now. A consideration of the record on this question does not support the claim of the plaintiff."

CONCLUSIONS.

I.

There is an independent ground of state procedure as a basis for the decisions below.

II.

The question of fraud in procuring the New York judgment is a question of fact which was found and determined by the lower courts.

III.

Under the Ohio practice the action on the New York judgment was properly defended on the ground of fraud in the procurement.

Respectfully submitted,

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Attorney for Respondent.

APPENDIX A.

Motion for New Trial in Trial Court.

Plaintiff moves the court for an order setting aside the decision heretofore rendered in this case and granting a new trial, for the following reasons, to wit:

1. The decision of the court is against the weight of the evidence and contrary thereto.

2. The decision of the court is contrary to law.

3. The court erred in the admission of evidence over the objection and exception of plaintiff.

4. The court erred in excluding evidence offered by plaintiff to which objection was made and exception was taken.

5. The court erred in overruling plaintiff's motion for judgment at the close of defendant's case.

6. The court erred in overruling plaintiff's motion for judgment at the close of all of the evidence.

7. Other errors of law occurring at the trial of said cause prejudicial to the rights of plaintiff and by which plaintiff was prevented from having a fair trial.

8. The decision is not sustained by sufficient evidence and is contrary thereto.

Plaintiff moves the court for a judgment in his favor notwithstanding the decision of the court.